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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO. 245

ZIFFRIN, INCORPORATED,
Appellant,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Appellees.

APPELLANT'S PETITION FOR REHEARING

IRA HOWELL ELLIS,
JOHN S. POWELL,
520 Illinois Building,
Indianapolis, Indiana,
Counsel for Ziffrin, Incorporated, Appellant.

February 25, 1943.

Central Publishing Company, Indianapolis, Ind.

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TO THE SUPREME COURT OF THE UNITED STATES:

Comes now Ziffrin, Incorporated, Appellant in the above entitled cause, and files this, its petition for rehearing of the above entitled cause, and in support of said petition, respectfully represents and shows to the court, that:

1. On February 1, 1943, this court affirmed the judgment of the United States District Court for the Southern District of Indiana in the above entitled cause, which judgment dismissed for want of equity a petition for an

interlocutory and final injunction to set aside and annul an order of the Interstate Commerce Commission in its cause No. MC 2511, entitled Ziffrin, Inc., Contract Carrier Application, decided May 29, 1941.

The opinion of this court, delivered by Mr. Justice Reed, considers at some length another order of the Interstate Commerce Commission entitled Ziffrin, Inc., Contract Carrier Application, reported at 33 M. C. C. 155. The opinion states that the above order of the Interstate Commerce Commission was called to the attention of the court by the government in brief and argument and that under those circumstances this court will not disregard it.

The opinion of the court does not refer to the position of appellant relative to the order reported at 33 M. C. C. 155. The appellant made no reference to this order in its first brief to this court because appellant considered it improper to discuss matters which appellant believes to be outside of the record. When this order was interjected into the case before the court in appellees' brief, appellant did refer to said order in its reply brief at pages 10 and 11, where, commenting upon the use made of this order by appellees, appellant said:

> "We respectfully submit that no consideration whatsoever should be given by this court to matters discussed by appellees which are outside the record."

At the time of oral argument before this court, counsel for appellees referred to said order briefly, and admitted that said order and the circumstances connected with it are not a part of the record before this court. Counsel for appellant was interrogated concerning said order at some length by members of the court, and attempted to reply insofar as time permitted.

In the brief time allotted for argument of cases on the summary docket, counsel for appellant did not have an opportunity to develop fully the circumstances surrounding the negotiations which resulted in the order of the Interstate Commerce Commission reported at 33 M. C. C. 155.

2. The record before this court shows that the answers of appellees, United States of America and Interstate Commerce Commission, filed in the court below, prior to the negotiations which resulted in the order reported at 33 M. C. C. 155, admit that Ziffrin, Inc., had exhausted all its remedies before the Interstate Commerce Commission before filing its petition for injunction in the District Court of the United States for the Southern District of Indiana.

On January 17, 1942, after the taking of evidence in the court below in this cause, being No. 448 in the United States District Court for the Southern District of Indiana, Indianapolis Division, and during the argument of counsel which followed the taking of evidence in the court below, the court called a recess and invited counsel for all parties to consult with the court in chambers. At this conference, members of the court made inquiry of counsel as to whether or not some plan could be worked out to meet the objections of the Interstate Commerce Commission as set out in its order of May 29, 1941. Counsel for Ziffrin, Inc., indicated that plaintiff would welcome such an opportunity to reopen the case before the Interstate Commerce Commission, providing the Interstate Commerce Commission would agree to reconsider the evidence in the record as to the scope of the territory and commodities claimed by Ziffrin, Inc., in its application and would set the cause down for further hearing as to the relationship between Ziffrin, Inc., the contract carrier, and Ziffrin Truck Lines, Inc., the common carrier, and

that if the cause was set down for further hearing on the question of dual operations that Ziffrin, Inc., would introduce evidence showing a complete divestment of any common control by relationship or otherwise between the two carriers.

There followed a discussion of the matter by various persons present at the conference and no one voiced any objections to the proposal. Counsel for Ziffrin, Incorporated, stated that a petition would be filed with the Interstate Commerce Commission in line with the suggestion of the court.

3. As far as appellant is advised, there was no record kept of the conference at which the agreement to attempt to settle the litigation was reached. Among the persons present at said conference, however, were Russell J. Dean, attorney-at-law, Indianapolis, Indiana, counsel for Emmett J. Williams, et al., members of the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers, intervenors in the cause before said district court, and Milledge Galphin, Jr., attorney-at-law, Louisville, Kentucky, counsel for Joseph E. Seagram & Sons, Inc., and Calvert Distillery Company, intervenors in said cause before the district court.

Attached to this petition as Appendix "A" and made a part hereof by reference is the affidavit of said Russell J. Dean relative to what occurred at said conference, and attached to this petition as Appendix "B" and made a part hereof by reference is the affidavit of said Milledge Galphin, Jr., relative to what occurred at said conference. The statements included in these affidavits speak for themselves and appellant respectfully requests the court to consider said affidavits in connection with this petition.

4. Following said conference the court, in open court, fixed the brief date in Cause No. 448 in the United States District Court for the Southern District of Indiana, Indianapolis Division, Ziffrin, Incorporated, plaintiff, v. United States of America and Interstate Commerce Commission, defendants, without regard to or consideration of said agreement to attempt to compromise the case, and the plaintiff, Ziffrin, Incorporated, did on January 27, 1942, file its printed brief in 113 pages with said district court, and said brief was devoted to a discussion of the law and the evidence before said court in said case.

In said brief, the plaintiff, Ziffrin, Incorporated (appellant here), made no reference to said agreement to attempt to compromise and settle the litigation, and it is obvious that the plaintiff could not have discussed the order of the defendant Interstate Commerce Commission now reported in 33 M. C. C. 155, for said order of said Interstate Commerce Commission shows on its face that it was not entered until April 6, 1942.

5. Counsel for appellant, Ziffrin, Incorporated, did prepare and file with the Interstate Commerce Commission a petition to reopen the cause before the Commission, and attached to said petition was a tentative plan for eliminating the common control of Ziffrin, Inc., and Ziffrin Truck Lines, Inc., which control was the basis of the denial order of the Interstate Commerce Commission dated May 29, 1941.

Following the filing of said petition, the appellee, Interstate Commerce Commission, on April 6, 1942, entered its order denying said petition for reopening and reconsideration of the proceedings, and in said order attempted to pass upon the tentative plan of divestment of common control of appellant, Ziffrin, Incorporated, and Ziffrin Truck

Lines, Inc., submitted with said petition without the hearing of any evidence whatsoever concerning said tentative plan. The order of the appellee, Interstate Commerce Commission, refusing to reopen the case was contrary to appellant's understanding of the agreement arrived at at the conference held at the request of the judges sitting in the United States District Court for the Southern District of Indiana, heretofore referred to in this petition.

6. Appellant recognizes the fact that this court may take judicial knowledge of printed reports of the orders of the Interstate Commerce Commission.

Since this court has considered the order of the appellee Interstate Commerce Commission dated April 6, 1942, and reported at 33 M. C. C. 155 in connection with its decision that rejected appellant's contention it has not been given an opportunity to show compliance with amended Section 210 of Part II of the Interstate Commerce Act, we believe that the court should give consideration to the fact that said order of the appellee Interstate Commerce Commission, while made without any hearing or without any evidence, erroneously states matters which were in evidence before the appellee Interstate Commerce Commission and which are in evidence before this court, and further we believe that the court should give consideration to the fact that the appellee Interstate Commerce Commission makes said erroneous statements concerning said evidence the basis for its rejection, without hearing, of the tentative plan submitted by appellant in the petition filed by appellant with the appellee Commission at the request of the judges sitting in the district court.

In said order of April 6, 1942, in attempting to recite the stock ownership of appellant on October 27, 1937, when

oral argument was held before the appellee Commission, the order states:

> "A brother-in-law of Ziffrin who at one time owned 39% of applicant's stock had died at the time of the oral argument, but his estate still owned 14.5% of the outstanding stock. Thus, Ziffrin and his relatives at that time owned or controlled 65.5% of all of applicant's stock."

The stockholder "who at one time owned 39% of applicant's stock" was S. O. Berman of Logansport, Indiana, and exactly who Mr. Berman was prior to his death was in evidence before the appellee Commission and is in the record before this court. (R. 298, Ex. 3, R. 85.) Mr. Berman was not the brother-in-law of Mr. Sam Ziffrin, as erroneously stated by the appellee Commission in its order of April 6, ... 2, and furthermore, Mr. Berman was not related to Mr. Ziffrin in any manner whatsoever. The death of Mr. Berman occurred following the hearing before the appellee Commission, but prior to oral argument before the appellee.

At the time of the oral argument before appellee, appellant called this situation to the attention of appellee, and further called to the attention of appellee the fact that Mr. Frank McHale of Indianapolis, Indiana, had acquired a part of the stock formerly owned by Mr. Berman, and that a part of the stock formerly owned by Mr. Berman was still held by the estate of Mr. Berman.

In the order of April 6, 1942, in rejecting the tentative plan submitted, it is clear that the appellee Commission arrives at the conclusion that Mr. Ziffrin would remain in control of appellant by combining his stock ownership with that of his alleged but not actual brother-in-law, Mr. Sam Berman. In that connection the order of April 6, 1942, states:

"There is also no explanation as to the present ownership of the 14.5% of the stock which at that time was held by the estate of Ziffrin's brother-in-law."

Here again the appellee erroneously referred to the estate of Mr. Berman as being the "estate of Ziffrin's brother-in-law" when in fact, as heretofore pointed out, Mr. Berman was not Mr. Ziffrin's brother-in-law and was not related to him. The portion of the stock of Mr. Berman not transferred to Mr. McHale is still owned by the estate of Mr. Berman.

Appellant calls to the attention of the court that in addition to erroneously stating that Mr. Berman was Mr. Ziffrin's brother-in-law in the order of April 6, 1942, the appellee Commission in the order complained of in this cause, the order of May 29, 1941, erroneously stated the stock ownership of appellant by omitting Mr. Berman as a stockholder altogether and stating that Mr. Berman's stock was owned by L. Berger of Averne, New York, in addition to the stock which Mr. Berger actually owned.

The stock ownership of the appellant and the relationship between stockholders, when any such relationship existed, both before and after the death of Mr. Berman, was available to the appellee Commission in the record before it, and is in the record before this court. The stock ownership which would have existed for appellant had the tentative plan attached to the petition to reopen, filed at the suggestion of the district court, been approved, was fully and completely set out in said petition. In spite of the fact that the stock ownership of appellant and the relationship between stockholders, when any such relationship existed, has been at all times clearly before the appellee, nevertheless, the appellee Commission has never, either in the order complained of dated May 29, 1941, or

in the order of April 6, 1942, correctly stated the stock ownership of appellant or the proposed stock ownership of appellant or the relationship existing between appellant's stockholders, when such relationships existed, although in both of said orders, and particularly in the order of April 6, 1942, the appellee Commission has based its findings upon erroneous statements of the facts relating to appellant's stock ownership.

Appellant respectfully submits that if the order of April 6, 1942, is before this court and can be used to defeat appellant's contention that it has been denied its day in court before the appellee Commission to show compliance with amended Section 210, then the order of April 6, 1942, should be before this court for all purposes, including an inquiry as to the misstatement of the facts relative to appellant's stockholders, as disclosed by the record before this court.

The opinion of this court, after quoting a portion of the order of April 6, 1942, states:

> "The Commission then restated the evidence showing common control of the two corporations, and concluded that the plan proposed would not change the situation." (Opinion of this court dated February 1, 1943, page 5.)

We respectfully submit that since the court has included in its opinion the statement just quoted, this court should reconsider its decision in view of the fact, as set out in this petition, that the appellee had erroneously stated the evidence before it, and before this court, and that the appellee based its conclusions, in part at least, upon said erroneous statement of evidence before this court.

Attached to this petition as Appendix "C" is the affi-

davit of Ira Howell Ellis, one of the attorneys for appellant, stating that this petition is presented in good faith and not for delay. This affidavit is made to show appellant's compliance with Rule No. 33 of this court.

WHEREFORE, appellant, Ziffrin, Incorporated, prays the Supreme Court of the United States to grant rehearing in Cause No. 245, October Term, 1942, entitled Ziffrin, Incorporated, appellant, v. Interstate Commerce Commission and United States of America, and for all other relief necessary and proper in the premises.

ZIFFRIN, INCORPORATED,
Appellant,

By: IRA HOWELL ELLIS,
JOHN S. POWELL,
520 Illinois Building,
Indianapolis, Indiana,
Its Attorneys.

APPENDIX "A"

Affidavit of Russell J. Dean

STATE OF INDIANA
COUNTY OF MARION ss:

Russell J. Dean, being first duly sworn, deposes and says:

1. That he is now and he was at all times covered by circumstances mentioned in this affidavit, an attorney at law engaged in the active practice of his profession at Indianapolis, Indiana, with offices at 520 Peoples Bank Building in said city of Indianapolis;

2. That he appeared as counsel for Emmett J. Williams, et al., intervenors in the case of Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, No. 448, in the United States District Court for the Southern District of Indiana, Indianapolis Division, and that said Emmett J. Williams was Secretary-Treasurer of Local No. 25 of the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers, and State Representative for Indiana of said International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers, and that the other intervenors represented by him were members of said International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers;

3. That as counsel for said intervenors he appeared and was present at the final hearing of said cause in said United States District Court for the Southern District of Indiana, Indianapolis Division, on January 17, 1942, when said cause was heard by a statutory three-judge court composed of the Honorable Sherman Minton, Cir-

cuit Judge, the Honorable John P. Barnes, and the Honorable Robert C. Baltzell, District Judges;

4. That following the taking of evidence in said case before said court, oral argument was presented to said court by counsel for the parties, and that during said oral argument said court called a recess and summoned counsel for the parties into the chambers of the Honorable Robert C. Baltzell, District Judge;

5. That included among the persons present in the chambers of said court pursuant to the request of said court were:

The Honorable Sherman Minton, Circuit Judge,

The Honorable John P. Barnes and the Honorable Robert C. Baltzell, District Judges,

Daniel H. Kunkel, Attorney for the defendant Interstate Commerce Commission,

Smith R. Brittingham, Jr., Special Assistant to the Attorney General of the United States, representing the defendant United States of America,

John S. Powell and Howell Ellis, representing the plaintiff, Ziffrin, Incorporated,

Milledge Galphin, Jr., representing the intervenors, Joseph E. Seagram & Sons, Inc., and Calvert Distillery Company,

Brainerd W. LaTourette, representing the intervenor, Common Carrier Division of the American Trucking Associations, Inc.,

A. Shelby Winstead, representing the intervenor, Louisville Provision Company,

Lew A. Robertson, counsel for the intervenor, The Beveridge Paper Company, and

your affiant;

6. That members of said court in said conference, entirely off of the record and independent of the proceedings being heard in open court, requested the parties to attempt to settle and compromise said lawsuit, and that after some discussion of the suggestions and requests of said court it was agreed by and between all parties present that attorneys for said Ziffrin, Incorporated would file a petition with the Interstate Commerce Commission requesting said Commission to reopen Cause No. MC-2511, entitled Ziffrin, Incorporated, Contract Carrier Application before said Commission, for the purpose of taking further evidence, and particularly for the purpose of taking further evidence relative to the status of said Ziffrin, Incorporated, in view of the provisions of Section 210 of the Interstate Commerce Act, effective September 18, 1940, and as to what steps had been taken or would be taken by said Ziffrin, Inc., fully to comply with the provisions of said section, and also particularly to review the scope of operating rights to which Ziffrin, Inc., is entitled;

7. That said Kunkel and said Brittingham, representing the defendants in said case pending before said United States District Court for the Southern District of Indiana, Indianapolis Division, agreed as representing their respective clients, that said case would be reopened by said Interstate Commerce Commission for the purpose of taking further evidence as aforesaid;

8. That said court indicated that decision of said case by said court would be withheld temporarily pending the result of said proceedings before the Interstate Commerce Commission, but said court, in open court, following said conference fixed the date for filing briefs in said suit without regard to any further proceedings before said Interstate Commerce Commission;

9. That your affiant was present during said conference and participated in said agreement, and that your affiant has set out fully and completely what occurred at said conference to the best of his knowledge and belief.

Further affiant sayeth not.

RUSSELL J. DEAN.

Subscribed and sworn to before me, a notary public in and for said county and state, this 16th day of February, 1943.

LUCILLE LARIMORE, Notary Public.

My commission expires May 1, 1943.

APPENDIX "B"

Affidavit of Milledge Galphin, Jr.

Milledge Galphin, Jr., being first duly sworn, deposes and says that:

1. He is now and he was at all times covered by circumstances mentioned in this affidavit, an attorney at law engaged in the active practice of his profession at Louisville, Kentucky, with offices at 613 Marion E. Taylor Building, in said city of Louisville.

2. He appeared as counsel for Joseph E. Seagram & Sons, Inc., and Calvert Distillery Company, intervenors in the case of Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, No. 448 in the United States District Court for the Southern District of Indiana, Indianapolis Division.

3. As counsel for said intervenors he appeared and was present at the final hearing of said cause in said United States District Court for the Southern District of Indiana, Indianapolis Division, on January 17, 1942, when said cause was heard by a statutory three-judge court composed of the Honorable Sherman Minton, Circuit Judge, the Honorable John P. Barnes, and the Honorable Robert C. Baltzell, District Judges.

4. Following the taking of evidence in said case before said court, oral argument was presented to said court by counsel for the parties, and during said oral argument said court called a recess and summoned counsel for the parties into the chambers of the Honorable Robert C. Baltzell, District Judge.

5. Included among the persons present in the cham-

bers of said court pursuant to the request of said court were:

The Honorable Sherman Minton, Circuit Judge,

The Honorable John P. Barnes and the Honorable Robert C. Baltzell, District Judges,

Daniel H. Kunkel, Attorney for the defendant Interstate Commerce Commission,

Smith R. Brittingham, Jr., Special Assistant to the Attorney General of the United States, representing the defendant United States of America,

John S. Powell and Howell Ellis, representing the plaintiff, Ziffrin, Incorporated,

Russell J. Dean, representing certain intervenors, members of the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers,

Brainerd W. LaTourette, representing the intervenor Common Carrier Division of the American Trucking Associations, Inc.,

A. Shelby Winstead, representing the intevenor, Louisville Provision Company,

Lew A. Robertson, counsel for the intervenor, The Beveridge Paper Company, and

your affiant.

6. Members of said court in said conference did not indicate to the parties what their views were as to the merits of the plaintiff's case, but did infer that the case did raise some serious questions and the court in said conference stated in substance through the presiding Judge that it would be better if some plan, settlement or compromise could be devised by which the assets and business of the plaintiff, Ziffrin, Incorporated, could be saved as a going concern and it continue to operate, as against a possible adverse decision, and the court did

thereupon request the parties to attempt to see if such a plan could be worked out with that end in view.

7. No objection was made by anyone at this conference in chambers to the said suggestion of the court, and the parties present indicated that the request of the court might be successfully carried out, and that they would work toward that end.

8. Thereupon the attorneys for the plaintiff, said Ziffrin, Incorporated, stated that they would file in behalf of said Ziffrin, Incorporated, a petition with the Interstate Commerce Commission requesting said Commission to reopen Cause No. MC-2511, entitled "Ziffrin, Incorporated, Contract Carrier Application" before said Commission to consider a plan which would be presented to meet the objections raised by the defendants and for the purpose of showing what steps had been taken, or would be taken by said Ziffrin, Incorporated, fully to comply with the provisions of Section 210 of the Interstate Commerce Act, effective September 18, 1940, and to hold a hearing upon said petition, and to determine upon a hearing the operating rights to which Ziffrin, Incorporated, was entitled.

9. No objection was made by the attorneys for the defendants to this proposal, and it was the understanding of this affiant from what was said between the attorneys for the defendants and the attorneys for the plaintiff, and by members of the court that it was agreed that the plaintiff and the defendants would attempt to settle the pending law suit and would proceed in the manner above stated.

10. The discussion in chambers aforesaid, and the request of the court and the agreement of the parties were entirely off the record and independent of the proceedings being heard in open court. No written record was

made at the time, in so far as known to this affiant, of what transpired in the aforesaid conference in chambers. It was the understanding of this affiant that the decision of the District Court in the pending case would be held in abeyance until the petition aforementioned could be filed and a hearing held thereon before the Interstate Commerce Commission.

11. This affiant is informed that thereafter the attorneys for the plaintiff, Ziffrin, Incorporated, did file with the Interstate Commerce Commission in the action aforementioned, its petition to reopen said action for further consideration, and did file with said petition the plan aforementioned, and that the order of the Commission with reference to said petition shows that it was filed pursuant to the suggestion or understanding had at the conference aforesaid, but this affiant is also informed by one of the attorneys for plaintiff that said petition was denied or overruled without said Commission affording the plaintiff an opportunity to be heard thereon.

12. This affiant was present during all of said conference and has set out fully what occurred at said conference to the best of his knowledge and belief.

Further affiant sayeth not.

MILLEDGE GAITHER, JR.

STATE OF KENTUCKY
COUNTY OF JEFFERSON ss:

Subscribed and sworn to before me, a Notary Public in and for the State and County aforesaid, this 13th day of February, 1943.

L. M. DUSELKAMP, Notary Public,
Jefferson County, Kentucky.

My commission expires November 7, 1946.

APPENDIX "C"

Affidavit of Ira Howell Ellis

STATE OF INDIANA
COUNTY OF MARION ss:

Ira Howell Ellis, being first duly sworn, deposes and says:

1. That he is an attorney-at-law, engaged in the active practice of his profession at Indianapolis, Indiana, with offices at 520 Illinois Building in said city of Indianapolis, and that he is one of the attorneys for the appellant, Ziffrin, Incorporated, before the Supreme Court of the United States in Cause No. 245, October Term, 1942, entitled Ziffrin, Incorporated, appellant, v. United States of America and Interstate Commerce Commission, appellees;

2. That as counsel for said Ziffrin, Incorporated, he has assisted in the preparation of the petition for rehearing in said Cause No. 245, October Term, 1942, Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, to which this affidavit is attached, and that he has read said petition and is familiar with the contents thereof;

3. That said petition for rehearing of said Ziffrin, Incorporated, filed in Cause No. 245, October Term, 1942, Ziffrin, Incorporated v. United States of America and Interstate Commerce Commission, is presented in good faith and not for delay.

Further affiant sayeth not.

IRA HOWELL ELLIS.

Subscribed and sworn to before me, a notary public in and for said county and state, this 18th day of February, 1943.

LUCILLE LARIMORE, Notary Public.

My commission expires May 1, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 245.—October Term, 1942.

Ziffrin, Incorporated, Appellant, *vs.* The United States of America and Interstate Commerce Commission.	On Appeal from the District Court of the United States for the Southern District of Indiana.

[February 1, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal brings here for review a judgment of a statutory three judge court denying a petition for an interlocutory and a final injunction setting aside and annulling an order of the Interstate Commerce Commission.[1] The order attacked denied an application of appellant, an Indiana corporation, filed February 4, 1936, for a permit to continue designated contract carrier operations under the grandfather clause of Section 209(a) of the Interstate Commerce Act.

The denial of the application by the Commission on May 29, 1941, 28 M. C. C. 683, was on the ground that applicant and Ziffrin Truck Lines, Inc., a certificated common carrier by motor vehicle, were owned, controlled and managed in a common interest and that under Section 210 of the Interstate Commerce Act, Part II, it would not be consistent with the public interest and the national transportation policy to grant the application.

Section 210 of the Motor Carrier Act was amended between the filing of the application and the entry of the order denying it. The two forms of Section 210 appear in the note below.[2]

It is appellant's contention that whatever may have been the effect of the earlier form, with the passage of the amendment after

[1] Urgent Deficiencies Act, 38 Stat. 208, 220, 28 U. S. C. §§ 47, 47(a); Judicial Code § 238, 43 Stat. 936, 938, 28 U. S. C. § 345; § 205(h) Interstate Commerce Act, Part II, 49 Stat. 543, 550, 49 U. S. C. § 305(h).

[2] Section 210 (49 Stat. 554), as originally enacted in the Motor Carrier Act, 1935, provided:

"No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held con-

the hearing the applicant should now have an opportunity to show the absence of common control of it and Ziffrin Truck Lines, Incorporated. As Section 210 stood when appellant requested its permit and at the hearing, a certificate as a common carrier and a permit as a contract carrier were not to be held by the same person without special finding of consistency with the public interest by the Commission. The amendment provided that without a similar special finding no person should hold a contract carrier permit who was under common control with a person holding a common carrier certificate. Person, of course, included a corporation. 49 U. S. C. 303(a)(1).

Obviously the fear of possible evasion led to the change in language. Indeed, the Commission had disregarded the corporate fiction and interpreted the earlier form as covering persons under common control.[3] This was called to applicant's attention by an order of June 23, 1938, setting the date for hearing the application.[4] The interpretation was discussed in the examiner's report, in the Commission's report, and applied, adversely to appellant, by the findings. 28 M. C. C. 683, 692-99.

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sistently with the public interest and with the policy declared in section 202(a) of this part."

Section 210, as amended (49 U. S. C. 310) by Section 21(a) of the Transportation Act of 1940 provides:

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

"(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

"(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

[3] In re New York & New Brunswick Auto Exp. Co., Inc., Common Carrier Application, 23 M. C. C. 663, 671. Cf. In re Bigley Brothers, Inc., Contract Carrier Application, 4 M. C. C. 711; Universal Service, Inc.,—Purchase—W. B. Arthur & Co., Inc., 15 M. C. C. 247.

[4] The order read in part as follows:

"Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC 2510) and if said applicant and the Ziffrin Truck

When the Transportation Act of 1940 was before the Senate, the draftsmen added a sentence to the earlier form of Section 210, reading as follows: "This section shall apply to dual operations by affiliated carriers." When the bill, S. 2009, in the two forms in which it was enacted in the Senate and the House of Representatives, was examined by the Interstate Commerce Commission, the Chairman of its legislative committee transmitted a report on the provisions of the bill to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the House Committee on Interstate and Foreign Commerce.[5] In the report (at page 62) this comment was made as to the present Section 210:

"Desirable.—(a) After the new section 22 which we have proposed above, add a new section 23 (with appropriate renumbering of subsequent sections) reading as follows:

'SEC. 23. Section 210 of the Interstate Commerce Act, as amended, is amended by adding at the end thereof the following new sentence: "This section shall apply to dual operations by affiliated carriers."'

This sentence has been introduced at the end of section 45 of the Senate bill, and it has our approval. The Commission has construed section 210 of part II to have such an application, but it is desirable to remove all doubt on the point."

At the conference of the committee for the two Houses of Congress, the form of Section 210 was changed to the present reading. The report contains this explanation:[6]

"Section 21(a). Dual Operations Under Certificates and Permits, Motor Carriers.

"The conference substitute in section 21(a) amends section 210 of the Interstate Commerce Act which prohibits a person from holding at the same time both a certificate as a common carrier of property by motor vehicle and a permit as a contract carrier of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that both forms of operating authority may be held consistent with the public interest and with the policy declared in part II, so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with, such person."

Lines, Inc., are found to be affiliated within the meaning of Section 5(6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202(a) of the Motor Carrier Act, 1935, within the meaning and contemplation of Section 210 of said Motor Carrier Act, 1935."

[5] Omnibus Transportation Legislation, House Committee Print, 76th Cong., 2d Sess.

[6] H. Rep. No. 2832, 76th Cong., 3d Sess., p. 78.

It is unnecessary, however, to decide whether the Commission correctly applied Section 210 as originally enacted to such common control as the Commission found in appellant and Ziffrin Truck Lines, Inc. We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. The permit was effective for the future and the amendment forbade persons under common control holding both a permit and a certificate. Previously appellant had been operating under an ex parte permit. Protests to the grant had been made on account of the dual operation, the formal hearing was held and the question raised by these protests was heard at length. A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, and cases cited. Cf. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464. *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation.

We find no basis for appellant's contention that he was given improper notice of the hearing and denied an opportunity to show compliance with the amended section. The steps of notice and hearing detailed above demonstrate the error of the former contention. As to the latter, it is met completely by the report and order of the Commission, made while this suit was pending in the District Court, and denying appellant's motion for reconsideration of the order of May 29, 1941. *Ziffrin, Incorporated, Contract Carrier Application*, 33 M. C. C. 155. This opinion was called to our attention by the Government in brief and argument. In the circumstances, we will not disregard it. The Commission there said, p. 156:

"At the conclusion of the trial on applicant's suit before the three-judge court, a conference was held between the counsel for all the parties to the suit in the court's chambers. It was there suggested by the court that applicant submit to this Commission some method for divorcing applicant herein from Ziffrin Truck Lines, Inc., which might eliminate the conflict with section 210 of the act on which the denial of the application was grounded. Pursuant to this suggestion, applicant has filed a petition seeking reopening and reconsideration of the proceeding, and, as a basis therefor, proposes a plan for elimination of the common control of applicant and Ziffrin Truck Lines, Inc. The petition is opposed

by an association of motor common carriers. It is understood that the filing of this petition and action by us thereon does not terminate the court proceeding. Pending our action on the petition, however, the entry of judgment by the court is being held in abeyance. In view of the pendency of the litigation, we believe that a statement of the reasons for our action with respect to this petition will be helpful."

The Commission then restated the evidence showing common control of the two corporations and concluded that the plan proposed would not change the situation. See 33 M. C. C. 155; 28 M. C. C. 683, 692, *et seq.* The evidence is ample to support the conclusion of the Commission entered at the earlier hearing. This is sufficient to support the order upon judicial review. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 185; *United States* v. *Maher*, 307 U. S. 148, 155.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.